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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 526.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, PETITIONERS,

versus

A. SPATES BRADY, RESPONDENT.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

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The Daily Record Co. Print, Baltimore.

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versus

A. SPATES BRADY, RESPONDENT.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

The petitioners stand on their petition for the writ and brief in support thereof, with the amendments and supplementary argument contained in this brief. The statement of facts is in the petition and by reference made part of the brief in support thereof.

In section I of the original brief, page 34, the reference to the attorney's fee should have been to Section 16(2) of the Interstate Commerce Act, which provides that "if the petitioner prevails he shall be allowed a reasonable attorney's fee." The carrier is also liable for the shipper's "costs of the suit." Section 8 previously cited is, however, the same in principle.

SUMMARY OF SUPPLEMENTAL ARGUMENT.

SUPPLEMENT TO SECTION I OF ORIGINAL BRIEF.

The statute provides for recourse to court only to collect the amount of the Commission's award. The history of Section 16 (2) so shows.

By express language originating in the Hepburn Act the complaint to the Commission in reparation cases is for the *recovery of damages*, while a petition to the court is for the *enforcement of an order* for the payment of money.

Neither the statute nor the decisions support respondent's contention that there is implicit in the statute a right of the shipper to a court review in reparation cases.

If respondent's contention that there is a court review is correct, several incongruous results ensue.

AMPLIFICATION OF PART OF SECTION V OF ORIGINAL BRIEF.

There was no discrimination against respondent, for he was offered the same car service that was given his competitor. It is mathematically demonstrated that allowance of 100 per cent. Western Maryland car service to respondent would have discriminated in his favor. That being true, the petition, when read with the exhibited reports, showed that the respondent had no right of action.

SUPPLEMENTARY SECTION.—THE QUESTIONS PRESENTED TO THIS COURT ARE SUFFICIENTLY RAISED BY THE RECORD.

Petitioners are not barred by failure of the record to show that the points raised were invoked in the district court.

The demurrers when filed sufficiently raised all questions in the district court under the Comformity Act.

There were general demurrers, and also demurrers specifically assigning as grounds that respondent's petition was for a sum in excess of the reparation order and also that the court as a court of law could not consider, review, revise or reverse the award.

If no demurrer had been filed the assignments of error sufficiently raised the points now urged.

A carrier is powerless to waive rights and defenses under a Federal statute. The local practice cannot affect the right nor the inability to waive defenses.

SUPPLEMENTAL ARGUMENT

SUPPLEMENT TO SECTION I OF ORIGINAL BRIEF.

In your petitioners' original brief, section I, beginning at page 25 thereof, it has been argued as follows:

The shipper's right of action and the district court's jurisdiction were limited in maximum amount to the sum awarded by the Interstate Commerce Commission's reparation order with interest, and the district court could not grant recovery of a greater amount.

Supplementing the argument in that brief, we add the following:

The statute provides for recourse to a court only to collect the amount of the Commission's award. The history of Section 16 (2) *so shows.*

A contention of the respondent is that a court review in reparation cases is in some way implicit in the statute. No statutory sanction exists. As far as we know there is no judicial sanction except the dicta of the statutory court in *Brady v. Interstate Commerce Com.*,

43 F. (2d) 847. The *Standard Oil case*, 283 U. S. 235, and similar cases already cited relating to reparation orders, *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, regarding valuation, *Piedmont & N. R. Co. v. United States*, 280 U. S. 469, regarding certificates of convenience and necessity, and *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, 529, 530, referring to accounting, with their historical outline and numerous citations, negative the respondent's contention.

Section 16(2) in very much its present form (except as to the state court jurisdiction) came into the Interstate Commerce Act by way of the Hepburn Act (Act of June 29, 1906, 34 Stat. at L. 584, Section 5). The parts of Sections 4 and 5 of that Act, relating to injunctions and to reparation orders, are in the appendix to this brief. By these sections jurisdiction "to enjoin, set aside, annul or suspend any order or requirement of the Commission" was vested in the circuit courts. Sufficient of the history in the latter aspect is embodied in the following extract from *United States v. Los Angeles & S. L. R. Co.*, supra:

> "But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act. [Cases cited.] For the first nineteen years of the Commission's existence no order was so reviewable. The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the ratemaking power was conferred upon the Commission, and then disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, chap. 3591, Secs. 2-7, 34 Stat. at L. 584, 586-595, Comp. Stat. Secs. 8569, 8597, 8582-8585, 8592, 8604a, 4 Fed. Stat. Anno. 2d ed. pp. 406, 549, 457, 458, 493, 499. The first suit to set aside an order was brought soon after. Stickney v. Interstate Commerce Commission (C. C.) 164 Fed. 638,

215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, chap. 309, Sec. 1, 36 Stat. at L. 539; and, when that court was abolished, to the district courts, by the Urgent Deficiencies Act."

The jurisdiction "to enjoin, set aside, annul or suspend" an order, so conferred, was in marked contrast to the more limited jurisdiction over reparation orders which, as already stated, was contingent upon non-compliance by the carrier, and was essentially a jurisdiction to enforce them. This is clear from the whole tenor of Section 16 as created by Section 5 of the Hepburn Act. The last sentence of the paragraph of that Section 5, which conferred the jurisdiction, is especially clear. It read:

> "All complaints for the *recovery of damages* shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the *enforcement of an order* for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after." (Italics ours).

By the express language, therefore, a complaint to the Commission was "for the *recovery of damages*"; while the petition to the court was "for the *enforcement of an order* for the payment of money."

By the Commerce Court Act of June 18, 1910 (36 Stat. at L. 539), jurisdiction over "cases brought to enjoin, set aside, annul or suspend in whole or in part any order" was conferred on the Commerce Court. By the same Act, Section 16 was amended so as to give jurisdiction over actions for damages following non-compliance with a reparation order, not only to the circuit courts of the

United States but alternatively to "any state court of general jurisdiction having jurisdiction of the parties." The evident purpose of leaving the jurisdiction for the enforcement of reparation awards in the circuit courts and adding the state court jurisdiction, rather than to confer it on the Commerce Court, was to avoid any requirement that shippers from every part of the country resort to the Commerce Court.

By the Act of October 22, 1913 (38 Stat. at L. 219), abolishing the Commerce Court, its jurisdiction was transferred to the district courts and still remains there in substantially the same form. But no change was made in the reparation provision which originated in what is now Section 16(1), (2) and (3). Nor has there been subsequent amendment of that paragraph except in particulars immaterial here. The latter are in the Transportation Act of February 28, 1920 (41 Stat. at L. 491, 492) and the Act of June 2, 1924 (43 Stat. at L. 633).

The sentence already quoted from the Hepburn Act remains in almost the same language, but in altered arrangement, in Section 16(3) of the Interstate Commerce Act (USCA, Tit. 49, Ch. 1, Sec. 16(3), clauses (b) and (f)). The following are the clauses:

> "(b) All complaints against carriers subject to this chapter for the *recovery of damages* not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.
>
> "(f) A petition for the *enforcement of an order* of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after." (Italics ours).

In the existing statute, therefore, the proceeding before the Commission is still "*for the recovery of damages,*" while the court proceeding is "for the *enforcement of an order* for the payment of money."

In *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U. S. 654, 661, it was said to be "clear that the action is not on the award as such." (See *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430). But although not on the award as such, the action is yet "for the enforcement" of the order. By the intent of the statute the shipper endeavors to enforce the order to the full. The carrier, having the right of "contestation of all issues," as pointed out in the *Meeker case* and others, attacks the order. The Commission's findings of fact and order are prima facie evidence. The shipper has the right to introduce additional evidence to maintain the order. The carrier has the right to introduce evidence in attack on the order.

Again, if it be true, as respondent insists, that the action accorded the shipper by Section 16(2) following non-compliance by the carrier, entitles him to a so-called court review, as distinguished from judgment in enforcement of the Commission's order, the following incongruous results ensue:

1. The instance of reparation orders would be the only one in which a plaintiff may obtain a court review, with the objective of annulling an order of the Commission in a court of law. The whole history of interstate commerce legislation has confined the jurisdiction "to enjoin, set aside, annul or suspend" orders to courts of equity, except in the sole instance of the Commerce Court, which was in effect a court of equity, and did not possess any jurisdiction over reparation orders. The result would be in direct contravention of the *Standard Oil case*, 283 U. S. 235.

2. The power of judicial review, in all other parts of the statute confined to the Federal courts, would be conferred on the multitude of State courts, with the possibilities of varying or conflicting judgments as to the Commission's orders.

3. There would be conflict with Section 9 of the Interstate Commerce Act, quoted in the appendix to the original brief. A shipper may in some instances elect between a complaint to the Commission, and an action in a Federal district court. By the *Standard Oil case*, 283 U. S. 235, 240, it was said:

> "Section 9 of the Interstate Commerce Act * * * provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by an action in a federal district court of competent jurisdiction, but that the claimant or claimants 'shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.' Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking reparation upon the same claims by the alternative method of procedure."

See also *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 457; *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 290.

If after resorting to the Commission and obtaining a disappointing result there, the shipper could treat the Commission's order as a nullity, or procure its annulment in whole or part, by judicial action, he would, in effect, sue as if the order, to the extent of the annulment, had never been made, and as if he had never been before the Commission and had pursued his remedy in the court

in the first instance. The requirement of election would be useless. He might as well be relegated to suit in the first instance in every case.

4. Section 16(3)(f) provides that the petition "for the enforcement of an order of the Commission for the payment of money" shall be filed within one year. This clearly applies only to suits to recover the *amount of the award*. If suit can be brought to recover the greater amount claimed, rather than the amount of the award, as respondent contends Section 16(2) to permit, there is no time limitation for suit within the statute.

AMPLIFICATION OF PART OF SECTION V OF ORIGINAL BRIEF.

In your petitioners' original brief, section V, beginning at page 50 thereof, it has been argued as follows:

The respondent not only was limited in recovery by the amount of the Commission's award, but suffered no discrimination or recoverable damages.

It is desired to amplify the part of that argument contained in the last three paragraphs of page 51, as follows:

The petition, with the exhibited reports, does not show that the allocation of 20 per cent. by the Baltimore and Ohio and 80 per cent. by the Western Maryland was an undue or unreasonable preference or advantage to the Coal Company, nor subjected the respondent to any undue or unreasonable prejudice or disadvantage, nor unjustly discriminated against him. The petition and reports show that car service on the offered basis was as usable and relatively as valuable to respondent as to the Coal Company. He would have received from the better car supply of the Western Maryland, alleged in the peti-

tion (R. 4),* and the lesser car supply of the Baltimore and Ohio as high a percentage of his rating as given to the Coal Company. The allegation of his petition that he would have used 100 per cent. Western Maryland car service (R. 4), if permitted, establishes that he could have used his proportion of 80 per cent. from that company. The allegation that, while refusing the Western Maryland 80 per cent., he used the lesser Baltimore and Ohio supply (R. 4), establishes that he could also have used his proportion of 20 per cent. from that company. The petition and first exhibited report show that the relevant period was one of car shortage and that there was a market for all coal that could be produced (R. 3, 18).

The combined petition and first report show that the Commmission found that the basis of car distribution was arrived at to suit the business of the Coal Company, and that "similar treatment," therefore, demanded that respondent be given whatever basis of distribution he might elect, to suit his business, up to an aggregate of 100 per cent., with right to order the whole 100 per cent. from the Western Maryland (R. 6, 19, 20). But that report discloses that the carriers themselves fixed the basis to be applied to the Coal Company. This basis as to the Coal Company reflected the proportions of its past shipments via the respective roads. The carriers had to impose a restriction to prevent the Coal Company from ordering its full rating from both roads. The restriction imposed was reasonable under the circumstances, and in extending "similar treatment" to respondent, the other shipper similarly situated, it was the duty of petitioners to give the equal service of 80 per cent. from the

* Record references are to the page numbers of the transcript which was filed with the petition for the writ, being the marginal page numbers of the reprinted transcript.

Western Maryland and 20 per cent. from the Baltimore and Ohio. The benefit or advantage, whether to the Coal Company or to respondent, rested in the privilege of drawing from the better car supply of the Western Maryland. The avoidance of prejudice to the other shipper similarly situated with the Coal Company required that he be permitted to order an equal percentage of Western Maryland cars. The avoidance of prejudice also required that no shipper similarly situated be permitted to order from the Western Maryland more than the 80 per cent. allowed to the Coal Company.

A simple illustration suffices. Assume that the respondent and the Coal Company had an established rating of 20 cars per day for their respective mines, that the Baltimore and Ohio had available a 25 per cent. car supply and the Western Maryland a 50 per cent. supply. If restricted to the Baltimore and Ohio each would receive, upon ordering its or his full rating, 5 cars per day. If permitted to order on the full basis from the Western Maryland each would receive 10 cars. If limited to the basis of 80 per cent. from the Western Maryland and 20 per cent. from the Baltimore and Ohio, each would receive 9 cars. To have allowed the Coal Company 80 per cent. from the Western Maryland and 20 per cent. from the Baltimore and Ohio, would have given it 9 cars per day. To have restricted respondent at the same time to Baltimore and Ohio cars, or 5 per day, would clearly have constituted a preference of 4 cars to the Coal Company. To restrict the Coal Company to the 80-20 basis while allowing the respondent to obtain his whole supply, 10 per day, from the Western Maryland would have constituted a preference of one car in his favor. The extension to respondent of the 80-20 basis kept the two on a parity. Your petitioners offered to do this. The offer, though concealed in the petition itself, was not denied by

it. The offer was found by the Commission to have been made (R. 22), as the exhibited second report shows. As already pointed out in our original brief a pleading is to be construed the more strongly against the pleader.

If, as the respondent alleges, he would have ordered his entire supply from the Western Maryland, he would have received a substantial preference. The Commission's reports and order, sanctioning this preference, were in direct contravention of the statute.

Reading the reports as part of the petition the respondent received treatment equal to that of the Coal Company, and in legal contemplation, suffered no damage. The petition, therefore, showed that the respondent had no right of action. It was inconsistent with and failed to support the judgment.

SUPPLEMENTARY SECTION.—THE QUESTIONS PRESENTED TO THIS COURT ARE SUFFICIENTLY RAISED BY THE RECORD.

The respondent argued in the brief in opposition to the granting of the writ, that your petitioners are barred by failure of the record to show that the points raised here were invoked in the district court.

1. The Circuit Court of Appeals treated the points as properly raised, and decided most of them on the merits, according to its conception of the law.

2. As indicated in the petition for certiorari, page 9, your petitioners in 1930 demurred generally to the petition (R. 33, 34), which as the law then stood raised all questions as to the sufficiency of the petition. The law then prohibited special demurrers (Barnes' West Vir-

ginia Code of 1923, Ch. 125, Sec. 28; see *Cook v. Dorsey*, 38 W. Va. 196, 200). The Code provision read:

> "The form of a demurrer or joinder in demurrer shall be:
>
> " 'The defendant (or plaintiff) says that the declaration (or plea, etc.,) is not (or is) sufficient in law.' "

Despite that statute, your petitioners in 1930 also filed demurrers which assigned as grounds, among others, that the petition of the respondent was for a sum in excess of the Commission's award, and also that the district court, as a court of law, could not "consider, review, revise or reverse" the award (R. 33, 34). The demurrers were overruled after consideration by the court (R. 39).

3. The statute of West Virginia in effect when the demurrers were filed (Barnes' Code of 1923, Ch. 125, Sec. 29), provided in part:

> "If nothing be alleged by the demurrant in support of his demurrer, the court, if it overrule the same, shall state that fact in the order; and if final judgment be obtained in the cause by the party whose pleading is demurred to, the same shall not be reversed by reason of any defect in the pleading so demurred to."

That section applied only if the record showed affirmatively that nothing was alleged in support of the demurrer. Otherwise the sufficiency of the pleading demurred to was still open for review on all points under a general demurrer, assigning no specific grounds (*Koontz v. Koontz*, 47 W. Va. 31, 33; *Wm. Jones Sons v. Farley*, 71 W. Va. 173, 174).

4. The "Official Code of West Virginia, 1931," relied on by the respondent, became effective January 1, 1931,—

after the demurrers were filed. As by the law of West Virginia in effect when the demurrers were filed, they would have been sufficient to entitle the petitioners to a full review in the State Supreme Court of the question of the sufficiency of the petition in any aspect, they therefore raised the questions sufficiently in the district court under the Conformity Act. In *Hill v. Smith*, 260 U. S. 592, 594, which involved the Bankruptcy Act, and came to this Court from the Supreme Judicial Court of Massachusetts, it was said:

> "We deem it enough to say, as to the first, that the appellate court treated the question as open, and decided it; and as to the second, that here, as in *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265, though perhaps in a somewhat less intimate and obvious way, the burden of proof is so connected with the substantive rights given to the respective parties by the statute—indeed, so flows from the words of the statute—that the ruling upon it may be reviewed here."

5. By the Federal practice, even if no demurrer had been filed below, the assignments of error Nos. 1 and 61 in the Circuit Court of Appeals (R. 40, 63) sufficiently raised the points now urged (*Slacum v. Pomery*, 6 Cranch, 221; *Garland v. Davis*, 4 How. 131, 143; *New Orleans etc. R. Co. v. Morgan*, 10 Wall. 256; *Barth v. Clise*, 12 Wall. 400; *New Orleans Ins. Assoc. v. Piaggio*, 16 Wall. 378; *Baltimore & P. R. Co. v. Trustees of Sixth Presbyterian Ch.*, 91 U. S. 127; *Cragin v. Lovell*, 109 U. S. 194).

6. As the substantive questions in this case involve rights and defenses under a Federal statute, which a carrier is powerless to waive, the local practice could not affect the Federal right, nor the inability to waive defenses (*A. J. Phillips Tool Co. v. Grand Trunk W. R.*

Co., 236 U. S. 662, 664; *Kansas City Southern R. Co. v. Wolf*, 261 U. S. 133). And "a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice" (*Norfolk S. R. Co. v. Ferebee*, 238 U. S. 269, 273. See also *Central Vermont R. Co. v. White*, 238 U. S. 507, 511-513; *Hill v. Smith*, 260 U. S. 592, 594; *New Orleans & N. E. Co. v. Harris*, 247 U. S. 367, 370-372).

Respectfully submitted,

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Baltimore, Md.,
January, 20, 1932.

APPENDIX.

Hepburn Act of June 29, 1906, 34 Stat. at L. 584:

"Sec. 4. That section fifteen of said Act be amended so as to read as follows:

"'Sec. 15. * * * All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. * * *'"

"Sec. 5. That section sixteen of said Act, as amended March second, eighteen hundred and eighty-nine, be amended so as to read as follows:

"'Sec. 16. That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"'If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the

petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this Act may be presented within one year.

* * * * * *

" 'The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. * * * ' ".